METROPOLIS SECURITY SERVICES SDN BHD v. ANSELL INDUSTRIAL & SPECIALTY GLOVES (M) SDN BHD & ANOR

HIGH COURT MALAYA, ALOR SETAR
HASHIM HAMZAH J
[CIVIL APPEAL NO: 12(B) NCVC-13-3-2015]
20 DECEMBER 2015

CONTRACT: *Breach – Agreement – Agreement to provide services of 'static' guards – Whether understood to mean stationary – Whether service provider breached terms of contract when guard failed to patrol – Whether service provide breached agreement*

CONTRACT: *Terms – Express terms – Interpretation of terms used – Agreement to provide services of 'static' guards – Whether understood to mean stationary – Whether court could impose implied terms into contract – Whether guard required to patrol*

TORT: *Negligence – Duty of care – Breach of duty – Agreement to provide services of 'static' guards – Whether understood to mean stationary – Whether service provider breached duty of care when guard failed to patrol*

EVIDENCE: *Exhibit – Admissibility of – Failure to locate original exhibit – Whether measures taken to search and to produce original exhibit satisfactorily explained – Whether copy of exhibit could be admitted in evidence in court – Evidence Act 1950, s. 65*

EVIDENCE: *Adverse inference – Failure to call witness – Whether important witness – Whether withholding of evidence arose – Whether adverse inference should be drawn – Evidence Act 1950, s. 114(g)*

The appellant entered into an agreement ('the agreement') with the first respondent, *inter alia*, to provide services of unarmed static guards as specified under the Schedule of Service of the agreement. Although the location or premise was not mentioned in the agreement, it was not disputed that the premise was a factory owned by the second respondent at the material time. Following an incident of break-in causing two main substations at the factory being severely damaged and copper wiring stolen from both substation, the respondents proceeded to file a claim against the appellant in the Sessions Court for breach of contract and negligence for all the damages suffered. The Sessions Court Judge ('SCJ') decided in favour of the respondents and hence, the appellant appealed. The issues for the court's consideration were whether the SCJ erred, *inter alia*: (i) in imposing implied terms to the agreement to include patrolling as part of the services to be rendered by the appellant; (ii) in finding that the substation A was near to the guard house and therefore the guards should have noticed what was happening in the building.; (iii) admitting ID7 as exhibit and in considering the contents of ID7 against the appellant; (iv) in invoking adverse inference against the appellant under s. 114(g) of the Evidence Act 1950 ('Evidence Act') for its failure to call one Mohd Suhaimi.

Held (allowing appeal):

(1) The issue of implied terms will only come into the picture if the particular terms of the contract are not expressly stated. The court shall not add or subtract the terms of the contract if the parties have clearly and expressly agreed on the said terms. The terms in the Schedule of Service of the agreement were crystal clear. The terms 'static' was used and agreed by both parties and was understood to mean stationary, not active, not moving and definitely, as regards to the facts of the present case, not patrolling. Since the parties have made it clear in the agreement, there was no need to imply any additional terms to the agreement. It would be different matter altogether if the term 'static' was never used in the agreement. The SCJ had therefore erred in imposing implied terms as to the services to be rendered by the appellant to include patrolling. (paras 24, 26 & 33)

(2) The respondent could not contend that the appellant was estopped from claiming that they need not patrol the factory as they had been patrolling the factory all along in light of s. 91 of the Evidence Act. Since the respondents had failed to prove that the appellant had breached the terms of the agreement, the appellant need not disprove something that had not been proven against it. (paras 27 & 32)

(3) The appellant was only expressly required under the agreement to prove static guards, which the appellant did. The guard who was attacked made a police report and later left the investigation to the police and this was done rightly so. Hence, the appellant did not breach the terms of the agreement and did not breach its duty of care towards the respondents. (paras 35 & 36)

(4) There were inconsistencies in the testimonies as to the distance between the guard house and substation. There were other buildings in between the guard post and substation A and therefore, the guards could not see or hear anything happening on both the substations from the guard house. This fact, considered together with the fact that the guards were not required under the agreement to conduct patrols in the vicinity of the factory rendered the inference made by the SCJ, that the guards should have noticed what was happening at substation A, wrongly arrived at. (paras 40-42)

(5) The SCJ accepted the evidence of the witness, PW4, who stated that he was involved in handling ID7 from receiving it until scanning it for a copy but the document could not be located during trial. However, merely saying that ID7 could not be located for the purpose of trial without any satisfactory account as to the measures taken by the respondents to search for and to produce the original was not sufficient

to attract the applicability of s. 65 of the Evidence Act. Thus, ID7 ought not be admitted as evidence in court and the contents thereto should not be considered. (paras 49-50)

(6) Mohd Suhaimi was never an important witness for the appellant. He was not the one who entered into the agreement with the respondents and he was not privy to the attack or the break-in which had taken place. There was also no issue of withholding evidence in this case. Hence, adverse inference under s. 114(g) of the Evidence Act should never have been drawn against the appellant for its failure to call Mohd Suhaimi. (paras 53-55)

Case(s) referred to:

Caparo Industries Plc v. Dickman and Others [1990] 2 AC 605 ***(refd)***
Eastern Enterprises Ltd v. Ong Choo Kim [1969] 1 LNS 35 HC ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Reigate v. Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592 ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Tan Sri Tan Hian Tsin v. PP [1978] 1 LNS 199 FC ***(refd)***
Tang Chiok Sing v. Lian Fatt Sawmill Co [1976] 1 LNS 155 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11
Evidence Act 1950, ss. 65(1)(c), 91, 114(g)

For the respondents - Mohd Munzeer Zainul Abidin (Hafizulfahmi Yusof with him); M/s Yazid & Fahmi
For the appellant - Eddie Chuah; M/s Wong & Partners

Reported by S Barathi

JUDGMENT

Hashim Hamzah J:

Introduction

[1] This is an appeal by the appellant against the decision of the learned Sessions Court Judge on 23 March 2015 who decided in favour of the respondents.

Brief Facts

[2] The background facts are as follows.

[3] The appellant entered into an agreement with Marigold Industrial (M) Sdn Bhd (the first respondent before the name was changed on 31 January 2013) dated 1 February 2009 ("the said agreement"). (appeal record bundle C pp. 221-229).

[4] It was agreed between the parties that the appellant was to provide services as specified under the schedule of service of the said agreement which stated as follows:

> Being the services of **two unarmed static guard** for twelve and **one unarmed static guard** for eight hours a day at the rate of RM 3.50 per man hour.
>
> (emphasis added)

[5] It was also agreed by the parties that the appellant was to provide the services above for a consideration of RM3,586.80 payable by the first respondent at the end of each month.

[6] The period of the said agreement is one year, expiring on 31 January 2010. However, cl. 3 of the said agreement allows for the said agreement to remain in force in a monthly basis after the expiry of the one year period until either party terminates the said agreement. There was no evidence of the said agreement being terminated by either party.

[7] There was no mention in the said agreement as to the location or the premise in which the appellant was to provide such services but it was never disputed between the parties that the premise was located at Lot 49/63, Lorong Perusahaan 2B, Kulim Industrial Estate, 09000 Kulim, Kedah ("the said factory").

[8] The said factory was at that material time owned by the second respondent. The said factory was in the state of being transferred to Ire-Tex Paper Packaging Sdn Bhd ("Ire-Tex") whereby the second respondent was to deliver vacant possession of the said factory to Ire-Tex on or around February 2013. (appeal record bundle C pp. 275-298)

[9] On 22 November 2012, Wahab bin Hamid, an employee of the appellant made a police report in which he claimed that he was hit at the back of his head by three unknown Indian assailants. There was no mention of any losses in the report. (appeal record bundle C p. 256)

[10] PW4, an employee of the first respondent and the respondents' witness, gave evidence that he had knowledge of the alleged assault after being told of the same by one Suhaimi bin Khor from the appellant. No further action was taken by PW4 in regard to this incident.

[11] One month later, on 18 December 2012, representatives of Ire-Tex visited the said factory and found out that there was evidence of a break-in. The appellant was aware of this visit. On 19 December 2012, Ire-Tex informed the respondents of the break-in and the damage that they were able to find thereto.

[12] The respondents went to the said factory to investigate. It was later found that two main substations at the said factory were severely damaged and the copper wirings had been stolen from both substations. A police report was made by PW4 on 21 December 2012. (appeal record bundle C p. 305)

[13] The respondents then proceeded to file a claim against the appellant in Sessions Court Alor Setar under breach of contract and negligence for all the damages suffered as a result of the break-in.

[14] On 23 March 2015, after a full trial, the learned Sessions Court Judge decided in favour of the respondents. Unsatisfied with the decision of the learned Sessions Court Judge, the appellant proceeded with this appeal.

Preliminaries

[15] Firstly, it is trite law that an appellate court is slow to intervene with the findings of the trial court unless such findings are based on improper appreciation of evidence or if there exists serious misdirection of law or of facts by the trial court in arriving at a particular decision.

[16] Bearing this in mind I now turn to consider the issues raised by both parties. I have gone through the memorandum of appeal filed by the appellant and the submissions by both parties thereto. I have come to a conclusion that the main issue is as follows.

Main Issue

Whether The Learned Sessions Court Judge Erred In Imposing Implied Terms To The Said Agreement To Include Patrolling As Part Of The Services To Be Rendered By The Appellant

[17] The main issue in the present case is whether the learned Sessions Court Judge erred in imposing implied terms to the said agreement to include patrolling as part of the services to be rendered by the appellant.

[18] Firstly, the relevant part of the said agreement which can be found at the schedule of service is as follows:

> Being the services of **two unarmed static guard** for twelve and **one unarmed static guard** for eight hours a day at the rate of RM 3.50 per man hour.
>
> (emphasis added)

[19] It was submitted by learned counsel for the appellant that the express term of the contract is crystal clear. It was extensively submitted that the appellant was only required under the said agreement to deploy static guards. The term "static" as submitted by learned counsel for the appellant to mean stationary, not active and not moving. It was further submitted that the

appellant's guards will be breaching the terms of the said agreements if they go around patrolling the said factory. Therefore, since the term is clear, the court cannot impose any implied conditions in addition to what has been agreed by the parties.

[20] On the other hand, learned counsel for the respondents contended that it is the duty of a security company to carry out its services to ensure that a particular premise is protected from all forms of trespass or criminal activities. In this regard, during trial, the respondents submitted that the implied terms of the said agreement were as follows:

(a) to maintain a high degree of visibility and presence of security guards to deter any unauthorised entry into the factory;

(b) to confront and engage with intruders to protect all property within the premises of the factory from damage and theft;

(c) to observe for signs of criminal activities through patrolling; and

(d) to immediately report any security incidents to the respondents.

[21] The learned Sessions Court Judge agreed with the respondents. She further noted that there was no evidence on when and how the patrolling works were done by the guards employed by the appellant. The learned Sessions Court Judge found that the appellant should carry out patrols in the said factory.

[22] The learned Sessions Court Judge referred to the famous passage of Peh Swee Chin FCJ's judgment in the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151 where it was held, and I quote at great length, as follows:

> Implied terms are of three types. *The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contact*. The implied term contended for in this appeal belongs to this type and much more about this later.
>
> The *second type of implied term is one by operation of law*, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such *ratio decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide a safe system of work. Many of such decided and

specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an inference explained above.

The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s. 92(e) the Evidence Act 1950 seems to be custom-made to provide logistical support for this particular type of implied term. It will be remembered that s. 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.

Reverting to the **first type of implied term** which is dependent on a court drawing an inference as explained above, there are **two tests to fix the parties with such an intention**, ie that the **parties must have intended to include such an implied term in the contract**. **The first test is a subjective test,** as stated by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p. 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course".'

The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p. 137, that in regard to an implied term, '… it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p. 605 as '… of course, so and so will happen, we did not trouble to say that, it is too clear'.

Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239 at p. 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained. In doing so, I will not set out the evidence below in detail except to refer to such parts of it as and when necessary, as after all, this matter is not likely at all to go elsewhere from this court, as long as the parties and their counsel and the courts below are apprised of detailed facts.

(emphasis added)

[23] I have gone through the appeal records and the submissions by both parties. My findings in regard to this issue are as follows.

[24] Although the learned Sessions Court Judge was correct in quoting the cardinal principle of law as regards to the imposition of implied terms into a particular contract, she failed to appreciate that the issue of implied terms will only come into the picture if the particular terms of the contract are not expressly stated. The court shall not add or subtract the terms of the contract if the parties have clearly and expressly agreed on the said terms.

[25] This preposition of law can be seen in another Federal Court case of *Tang Chiok Sing v. Lian Fatt Sawmill Co* [1976] 1 LNS 155; [1976] 2 MLJ 241 which referred to the case of *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 where it was held as follows:

The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case", they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear". Unless the court comes to such a conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

(emphasis added)

[26] In the present case, the terms in the schedule of service of the said agreement is crystal clear. The term "static" is used and agreed by both parties. The term static is understood to mean stationary, not active, not moving and definitely as regards to the facts of the present case, not patrolling. Since the parties have made it clear in the said agreement, there is no need to imply any additional terms to the said agreement. It would be a different matter altogether should the term "static" was never there in the said agreement.

[27] Faced with this sort of argument, learned counsel for the respondents further contended that there were admissions by the witnesses for the appellant themselves that they have been patrolling the said factory all along, thus, the appellant was estopped from claiming that they need not patrol the said factory.

[28] The answer to this contention can be seen under s. 91 of the Evidence Act 1950 where the law is very clear that:

> **When the terms of a contract** or of a grant or of any other disposition of property **have been reduced** by or by consent of the parties **to the form of a document**, and in all cases in which any matter is required by law to be reduced to the form of a document, **no evidence shall be given in proof of the terms of the contract**, grant or other disposition of property or of the matter **except the document itself**, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.
>
> (emphasis added)

[29] There is no need to say more on this.

[30] Then learned counsel for the respondents finally contended that the appellant never pleaded such defence during trial.

[31] While this is partly true, the appellant did not agree with the claims therein and the respondents during trial was put on a strict burden to prove their case against the appellant.

[32] Since the respondents failed in the first place, by looking at the clear terms of the said agreement, to prove their case against the appellant that the appellant had indeed breached the terms of the said agreement, the appellant need not disprove something which had not been proved against it (see *Eastern Enterprise Ltd v. Ong Choo Kim* [1969] 1 LNS 35; [1969] 1 MLJ 236).

[33] Therefore, I find that the learned Sessions Court Judge was wrong in imposing implied terms as to the services to be rendered by the appellant to include patrolling for the reasons stated above.

[34] In consequence to this issue, the learned Sessions Court Judge further held that the factual matrix was also applicable in her finding that the appellant had breached its duty of care towards the respondents under the tort of negligence. The case of *Caparo Industries Plc v. Dickman and Others* [1990] 2 AC 605 was referred to.

[35] In the present case, however, since the appellant was only expressly required under the agreement to provide static guards, in which the appellant did, and the fact that the guard who was attacked did make a police report of the said attack and later left the investigation to the police, which was done rightly so, hence it cannot be said that the appellant had breached its duty of care against the respondents.

[36] Therefore, in a nutshell, I find that the appellant did not breach the terms of the said agreement and did not breach its duty of care towards the respondents. On these grounds alone I would have allowed the appellant's appeal.

Ancillary Issues

[37] For the sake of completeness, these issues raised by the appellant will be dealt with accordingly.

[38] The second issue raised by the appellant was that the learned Sessions Court Judge had erred in her findings that the substation A was near to the guard house and therefore the guards should have noticed what was happening in the said building.

[39] The relevant passage of the learned Sessions Court Judge's decision can be seen as follows:

> There was no evidence as to why the guards were ignorant of all the happenings at the factory. *In fact the guardhouse is just about 15 meters from the Main Substation A where the digging had taken place for removal of cables and other valuable items from the substation. It is impossible for the security guards not to notice or be aware of what took place at the factory.*
>
> (emphasis added)

[40] After going through the appeal records, it can be seen that there were inconsistencies of testimonies as to the distance between the guard house and substation A. The respondents' witness, PW3, gave evidence that the distance was approximately 15 metres whereas another respondents' witness, PW2, gave evidence that the distance was approximately 50 metres.

[41] Be that as it may, the evidence of DW2 particularly caught my attention where the main point that should be considered was whether the guards could see or hear anything happening on both the substations from the guard house. DW2 answered in the negative because there were other buildings in between the guard post and substation A. This was also evident from the layout plans of the said factory. (appeal record bundle C p. 330)

[42] Therefore, taking into account of the above facts, and the fact that the guards were not required under the said agreement to conduct patrols in vicinity of the said factory, I find that the inference made by the learned Sessions Court Judge that the guards should have noticed what was happening at substation A was wrongly arrived at.

[43] The third issue raised by the appellant was that the learned Sessions Court Judge had erred in admitting ID7 as exhibit and in considering the contents of ID7 against the appellant.

[44] In admitting ID7 as exhibit, the learned Sessions Court Judge was satisfied with the explanation of PW4. PW4 gave evidence that he was involved in handling the said document from receiving until scanning it for a copy but the said document cannot be located during trial.

[45] Section 65(1)(c) of the Evidence Act 1950 is very clear where it is stated that:

> Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (c) **when the original has been** destroyed or **lost**, or when the party offering evidence of its contents cannot for any other reason **not arising from his own default or neglect produce it in reasonable time**;
>
> (emphasis added)

[46] I am of the view that the explanation by the respondents were unsatisfactory so as to attract the application of s. 65(1)(c) of the Evidence Act 1950.

[47] In the Federal Court case of *Tan Sri Tan Hian Tsin v. Public Prosecutor* [1978] 1 LNS 199; [1979] 1 MLJ 73 the court found that there was sufficient proof of search and the secondary evidence was rightly admitted.

[48] The basic principle on applicability of s. 65 of the Evidence Act 1950 can be seen succinctly explained by the Supreme Court in the case of *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627 where it was held that:

> **Exceptions (a) and (c) rest upon the principle that a party tendering a copy has done all that lies in his power to produce the original.**
>
> Thus, basically, **secondary evidence of the contents of a document is inadmissible, until the non-production of the original is first accounted for**, so as to bring it within one or other of the cases provided for in the section (*Krishnakishori v. Kishori;2* and *Bhubaneswari v. Harisaran 3*).
>
> In the present case, based on the evidence of the respondent which *we have highlighted above, we are satisfied the respondent had not shown that the non-production of the record book had been satisfactorily accounted for so as to bring it*

within s. 65(1)(c) of the Evidence Act 1950. The respondent had also led no evidence to suggest that the non-availability of his record book was through no fault of his.

(emphasis added)

[49] Therefore, in the present case, by merely saying that ID7 cannot be located for the purpose of trial without any satisfactory account as to the measures taken by the respondents to search for and to produce the original was not sufficient to attract the applicability of s. 65 of the Evidence Act 1950.

[50] Thus, ID7 ought not to have been admitted as evidence in court and the contents thereto should not be considered.

[51] The fourth issue raised by the appellant was that the learned Sessions Court erred in invoking adverse inference against the appellant under s. 114(g) of the Evidence Act for its failure to call Mohd Suhaimi.

[52] In the case of Supreme Court case of *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, it was held at p. 232 (CLJ); p. 494 (MLJ) as follows:

It is essential to appreciate the scope of section 114(g) lest it be carried far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and **not merely on account of failure to obtain evidence**. It may be drawn from withholding not just any document, but material document by a party in his possession, or for **non-production of not just any witness but an important and material witness to the case**.

(emphasis added)

[53] In the present case, contrary to what has been held by the learned Sessions Court Judge, I found that Mohd Suhaimi was never an important witness for the appellant. He was not the one who entered into the said agreement with the respondents and he was also not privy to the attack or the break-in which had taken place.

[54] The learned Sessions Court Judge felt that the attendance of Mohd Suhaimi is important to establish that the appellant had left patrolling business to him and in rebutting ID7. Since the issue of patrolling was not an issue as has been decided earlier in this judgment, and since ID7 had already been marked a court exhibit, there is no issue of withholding evidence in the present case.

[55] Therefore, I am of the view that adverse inference should never have been drawn against the appellant for its failure to call Mohd Suhaimi to the stand.

[56] Another issue raised by the appellant was as regards to the interest ordered to be paid by the learned Sessions Court Judge at the rate of 5% from 22 November 2012 (the date the cause of action arose) which was well within the discretion of the judge under s. 11 of the Civil Law Act 1956. This I shall not disturb.

Conclusion

[57] In conclusion, based on all of the above, the appeal is hereby allowed. I further ordered costs of RM15,000 to be paid by the respondents to the appellant here and below.